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No. 00-799 (L)

IN THE

Supreme Court of the United States

THE CITY OF LOS ANGELES,

Petitioner,

—v.—

ALAMEDA BOOKS, INC. and HIGHLAND BOOKS, INC.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF *AMICUS CURIAE* OF MORALITY IN MEDIA, INC. IN SUPPORT OF PETITIONER

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26pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. IT IS NOT NECESSARY THAT A MUNICIPALITY SPECIFICALLY STUDY THE NEGATIVE EFFECTS OF "SEX SUPERMARKETS" WHERE TWO OR MORE ADULT USES ARE COMBINED UNDER ONE ROOF 5

A. *RENTON* ALLOWS FOR RELIANCE ON "DETAILED FINDINGS" IN OTHER JURISDICTIONS 5

B. A LEGISLATIVE BODY CAN USE ITS COLLECTIVE COMMON SENSE TO CONCLUDE THAT A "SEX SUPERMARKET" CAUSES DELETERIOUS EFFECTS 10

C. POST-ENACTMENT EVIDENCE OF NEGATIVE SECONDARY EFFECTS IS PERMISSIBLE WHEN A SEXUALLY ORIENTED BUSINESS REGULATION IS CHALLENGED 12

II. IT IS PROPER FOR A MUNICIPALITY TO RELY ON JUDICIALLY APPROVED STATUTORY PRECEDENT FROM OTHER JURISDICTIONS 15

A. THE *HART* CASE 15

B. *RENTON* ALLOWS FOR RELIANCE ON JUDICIALLY APPROVED FINDINGS IN OTHER COMMUNITIES OF "STUDIES" TREATING SEXUALLY ORIENTED BUSINESSES AS A "CLASS OR CATEGORY" OF USES MAY BE RELIED UPON 17

CONCLUSION 21

TABLE OF AUTHORITIES

CASES

801 Conklin St. Ltd. v. Town of Babylon, 38 F. Supp. 2d 228 (E.D.N.Y. 1999) 10

Alameda Books, Inc. v. City of Los Angeles, 222 F.3d 719 (9th Cir. 2000)..... 18

Ben Rich Trading v. City of Vineland, 126 F.3d 155 (3rd Cir. 1997)..... 13, 20

Buzzetti v. City of New York, 140 F.3d 134 (2d Cir. 1998), *cert. denied*, 525 U.S. 816 (1998)..... 18

City of Erie v. Pap's A.M., 529 U.S. 277 (2000) 9, 14

City of Renton v. Playtime Theatres, Inc., 475 U.S. 41 (1986) ..... 3, *passim*

DiMa Corp. v. Town of Hallie, 185 F.3d 823 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000)..... 7, 14

DiMa Corp. v. Town of Hallie, 60 F.Supp.2d 918 (W.D. Wis. 1998)..... 8

Hamilton Amusement Ctr. v. Verniero, 156 N.J. 254 (N.J. Sup. Ct. 1998), *cert. denied*, 527 U.S. 1021 (1999) 12

Hart Book Stores, Inc. v. Edmisten, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980) 4, 15, 16

Hickerson v. City of New York, 146 F.3d 99 (2d Cir. 1998), *cert. denied*, 525 U.S. 1067 (1999)..... 19

ILQ Investments, Inc. v. City of Rochester, 25 F.3d 1413 (8th Cir. 1994), *cert. denied*, 513 U.S. 1017 (1994) 18, 20

J & B Entertainment v. City of Jackson, 152 F.3d 362 (5th Cir. 1998)..... 14

Kismet Investors, Inc. v. County of Benton, 617 N.W.2d 85 (Minn. App. 2000), *review denied*, Nov. 15, 2000, 2000 Minn. LEXIS 709 (Minn. 2000)..... 17, 18

LaGrange Trading Company v. Nicolosi, 1991 U.S. Dist. LEXIS 3551 (E.D. La. 1991), *aff'd*, 953 F.2d 642 (5th Cir. 1992), *cert. denied*, 506 U.S. 817 (1992)..... 11

Mitchell v. Commission on Adult Entertainment Establishments, 10 F.3d 123 (3rd Cir. 1993)..... 5, 6, 7, 10, 13, 18

Phillips v. Borough of Keyport, 107 F.3d 164 (3rd Cir. 1997) 10, 12, 13, 14

Ranch House, Inc. v. Amerson, 238 F.3d 1273 (11th Cir. 2001) 9, 13

St. Louis County v. B.A.P., 18 S.W.3d 397 (Mo. App. 2000) 19, 20

Sammy's of Mobile v. City of Mobile, 140 F.3d 993 (11th Cir. 1998), *cert. denied*, 592 U.S. 1052 (2000) 9

Schultz v. City of Cumberland, 228 F.3d 831 (7th Cir. 2000) 8

Star Satellite, Inc. v. City of Biloxi, 779 F.2d 1074 (5th Cir. 1986) 6

State v. Russo, 745 A.2d 540 (N.J. Super. Ct. App. Div. 2000).... 11

Stringfellow s of New York v. City of New York, 694 N.E.2d 407 (N.Y. 1998)..... 19

Tee & Bee v. City of West Allis, 936 F. Supp. 1479 (E.D. Wis. 1996)..... 7, 8

Thames Enterprises v. City of St. Louis, 851 F.2d 199 (8th Cir. 1988)..... 8, 9, 11

Young v. American Mini Theatres, 427 U.S. 50 (1976)..... 9, 15, 16

Z.J. Gifts D-2, L.L.C. v. City of Aurora, 136 F.3d 683 (10th Cir. 1998), *cert. denied*, 525 U.S. 868 (1998)..... 20

OTHER AUTHORITIES

LOS ANGELES DEPARTMENT OF CITY PLANNING, STUDY OF THE EFFECTS OF THE CONCENTRATION OF ADULT ENTERTAINMENT ESTABLISHMENTS..... 4, 15, 17, 18, 19, 20

INTEREST OF *AMICUS CURIAE*

Morality in Media, Inc. as *amicus curiae*,[1] files this brief in support of the Petitioner in this case, which is before this Honorable Court on the merits under the provisions of Rule 37. The written consents of the parties were requested and all parties have consented in writing to the filing of this brief. Copies of the written consents are being filed concurrently with this brief.

Morality in Media is a New York, not-for-profit, interfaith, charitable corporation, organized in 1968 for the purpose of combating the distribution of obscene material in the United States and upholding decency standards in the media. Now national in scope, this organization has affiliates and chapters in various states. Its Board of Directors and Advisory Board are composed of prominent businessmen, clergy, and civic leaders. The Founder and President of MIM (until his death in 1985) was Reverend Morton A. Hill, S.J. In 1968, Father Hill was appointed to the President's Commission on Obscenity and Pornography. He and Dr. Winfrey C. Link produced the "Hill-Link Minority Report of the Presidential Commission on Obscenity and Pornography," which was cited by this Honorable Court in *Kaplan v. California*, 413 U.S. 115, 120 n.4 (1973) and in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 58 notes 7 and 8 (1973).

Morality in Media has an interest in this case because it is frequently asked by law enforcement agencies, state legislatures, city councils, and private citizens for advice and guidance on methods to enforce and improve existing laws

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[1] This Brief *Amicus Curiae* was authored in whole by Counsel of Record Paul J. McGeady and Co-Counsel Robin S. Whitehead of Morality in Media, Inc. and no part of the brief was authored by any attorney for a party. No person or entity other than this *amicus* made any monetary contribution to the preparation or submission of this brief. Rule 37(6).

regulating the distribution of obscenity. MIM recognizes this case to be a major precedent in the area of locating and controlling the effects of sexually oriented businesses at the local level.

Morality in Media has filed friend of the court briefs in this Court involving First Amendment issues, including: *FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *New York v. Ferber*, 458 U.S. 747 (1982); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491 (1985); *Fort Wayne Books, Inc. v. Indiana*, 489 U.S. 46 (1989); *Sable Communications v. FCC*, 492 U.S. 115 (1989); *Denver Area Consortium v. FCC*, 518 U.S. 727 (1996); *Reno v. ACLU*, 521 U.S. 844 (1997); *National Endowment for the Arts v. Finley*, 524 U.S. 569 (1998); *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *United States v. Playboy*, 529 U.S. 803 (2000); *City News and Novelty, Inc. v. City of Waukesha*, 121 S. Ct. 743 (2001); and *Ashcroft v. Free Speech Coalition*, No. 00-795.

Amicus is filing this brief in support of the Petitioner because we believe our brief contains relevant matter and alternative arguments that may not be presented to the Court by the parties.

SUMMARY OF ARGUMENT

The question upon which this Court has granted *certiorari* reads as follows:

> Is a city's zoning ordinance, which prohibits the operation of more than one adult entertainment business at a single location, including an adult bookstore and an adult arcade, invalid because the city did not study the negative effects of such combinations of adult businesses, but rather relied on judicially approved statutory precedent from other jurisdictions?

This question is the subject of this *amicus* brief and involves two lines of inquiry. First, whether it is necessary for a city to rely on sexually oriented business "use specific" studies under such circumstances. Secondly, whether or not a city may rely on judicially approved statutory precedent from other jurisdictions where that precedent may not involve "use specific" negative secondary effects.

The proposition that a municipality, in order to validly adopt a sexually oriented business ordinance that regulates the combination of two or more adult uses, must rely on newly created "use specific" studies does not comport with current case law. *Amicus* submits that, pursuant to the holding of *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), new or original studies are not necessary in each community since *Renton* tells us that local legislative bodies may rely on the "detailed findings" in other jurisdictions to ascertain evidence of negative secondary effects. It is also permissible for a local legislature to use its collective common sense to take legislative notice that combinations of these types of adult uses will cause deleterious effects. The great body of evidence in the many studies conducted over the past three decades is worthy of judicial notice, as well as

legislative notice, in making these assessments. Additionally, *Amicus* contends that the most recent line of cases hold that it is proper for a municipality to introduce evidence after the ordinance has been challenged even if not noticed or incorporated at the time of enactment. As such, a court's inquiry is not restricted to pre-enactment evidence of negative effects.

Based on *Renton*, a municipality can rely on judicially approved statutory precedent from other jurisdictions. In *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980), the Forth Circuit Court of Appeals upheld a zoning statute that sought to prohibit the "supermarket technique" of clustering more than one sexually oriented business at a single location. In fact, the *Hart* Court, actually relied on the same 1977 City of Los Angeles study at issue in the instant case, as support in finding that location restrictions for adult establishments are a valid means of zoning aimed to serve the legitimate interests in preserving residential neighborhoods and preventing urban decay and crime. Consequently, it was proper for the City of Los Angeles to rely on the judicially approved statutory precedent created by *Hart* when they enacted the same regulation.

Amicus submits that *Renton* allows for cities to rely on judicially approved findings in other jurisdictions that have upheld the use of secondary effects studies treating sexually oriented businesses as a "class or category" of uses for the purpose of enacting content-neutral regulations in order to minimize crime and economic effects on surrounding communities. Inasmuch as the issue of the necessity for case specific studies has not been previously before this Honorable Court, *amicus* has cited and relied on lower court opinions where the issue has been considered.

ARGUMENT

I. IT IS NOT NECESSARY THAT A MUNICIPALITY SPECIFICALLY STUDY THE NEGATIVE EFFECTS OF "SEX SUPERMARKETS" WHERE TWO OR MORE ADULT USES ARE COMBINED UNDER ONE ROOF

A. *RENTON* ALLOWS FOR RELIANCE ON "DETAILED FINDINGS" IN OTHER JURISDICTIONS

The Court ruled in *Renton* that "the First Amendment does not require that a city conduct new studies or produce evidence independent of that already generated by other cities before enacting an ordinance, so long as whatever evidence the city relies on is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52. Based on this language, a city need not rely on studies at all, but instead can rely on other types of evidence, so long as "whatever evidence" the city relies on can be shown to reasonably establish the existence of a nexus between adult uses and unwanted negative secondary effects. Specifically, the *Renton* Court held that a city may rely on the experiences of other cities, and in particular on the "detailed findings" in other jurisdictions. *Id.* at 51.

In *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3rd Cir. 1993), the Third Circuit Court of Appeals upheld regulations limiting the hours of operation of adult entertainment establishments. The Court found adequate factual support for the Delaware legislature's conclusion that the asserted undesirable secondary effects it sought to regulate resulted from the operation of these establishments.

In reaching this conclusion, the *Mitchell* Court looked to the language in *Renton* where this Court held that a city could rely upon "the opinions expressed in court decisions of other jurisdictions to establish that the location of adult entertainment establishments have a harmful effect on an area... 475 U.S. at 51." *Mitchell*, 10 F.3d at 133. This Court also noted in *Renton*, at 51, that the "detailed findings" summarized in another state's court opinion were before the Renton's City Council when it enacted its ordinance.

The plaintiff bookstores in *Mitchell* argued that no evidence was presented that conclusively established a connection between the harms asserted to be prevented and the restrictions imposed. Specifically, the record showed that no documents or sworn testimony in support of the bill were presented to the State Senate, nor were any public hearings conducted, at which time the adult entertainment establishments could have voiced their objections and arguments. Those appellants further contended that official new studies should have been undertaken to determine how the licensed establishments' operating hours affected the welfare of the neighborhoods. 10 F.3d at 132.

In rejecting this argument the Court of Appeals reasoned that, "Logically, reliance on the governmental purpose of ameliorating the adverse effects of marginally protected speech or expressive activity presupposes knowledge of them." *Mitchell*, 10 F.3d at 134. The Court held that it was sufficient for the State to rely on and make reference in the synopsis of the Senate Bill to the case of *Star Satellite, Inc. v. City of Biloxi*, 779 F.2d 1074 (5th Cir. 1986). The Third Circuit then found, in *Mitchell* at 136:

> In evaluating the importance of the governmental interest justifying a particular ordinance that incidentally restricts speech in order to curb the adverse effects of marginally protected activity, we do not think a court must close its eyes to evidence that has been presented and considered in other similar cases.

Accordingly, the *Mitchell* Court found that the Delaware legislature had before it a reasonable basis for deciding that the "closing-hours" amendment was needed to curb the harmful and unwanted incidental effects from sexually oriented businesses.

Likewise, in *Ben Rich Trading v. City of Vineland*, 126 F.3d 155, 162 (3rd Cir. 1997), the Third Circuit held that, although the studies and legislative record presented in *Mitchell* and other courts may have been more extensive than those referred to by the City of Vineland, it was permissible for the City to have relied on "the experiences, studies and conclusions of other jurisdictions about the secondary effects of adult theaters" and the City was not required to specify a "linkage" between its own experiences and those of the jurisdictions producing the studies upon which it intended to rely.

In *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000), the Seventh Circuit Court of Appeals affirmed the district court and held valid the Town's reliance on findings made in a similar case involving an hours of operation statute.

Although the Town did not recite a study or point to any local experience that showed why it believed such effects were correlated with such a business, it did submit to the district court that it had relied on the experience of West Allis, Wisconsin, which they found in *Tee & Bee v. City of West Allis*, 936 F. Supp. 1479 (E.D. Wis. 1996). When deciding to enact its ordinance, the "same factors" were deemed sufficient proof by the Town for enacting its

restricted hours of operation ordinance. *DiMa*, 60 F. Supp.2d 918, at 924 (W.D. Wis. 1998).

The district court in upholding the Town's reliance on the findings in *Tee & Bee* held:

> Just as in *Renton*, defendant seems to have gathered most of its "evidence" by reading prior decisions in which other municipalities were sued under similar circumstances. Regardless, just as in *Renton*, as "long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem," it is evidence enough. *Renton*, 475 U.S. at 52." *DiMa*, 60 F.Supp.2d at 924.

In *Schultz v. City of Cumberland*, 228 F.3d 831, 846 (7th Cir. 2000), the Seventh Circuit found that the city sufficiently established a secondary effects justification for its time, place or manner regulation, pointing out that its record was more extensive than that of the municipality in *DiMa*, 185 F.3d at 830, which relied solely on the judicial decision noting the experiences of another Wisconsin town.

The Eight Circuit in *Thames Enterprises v. City of St. Louis*, 851 F.2d 199 (8th Cir. 1988), also affirmed the district court's determination that the City of St. Louis's adult business zoning ordinance was constitutional despite the lack of original or further studies, empirical evidence, or an examination of the experiences of other cities regarding the effects of adult bookstores on neighborhoods.

The St. Louis Board of Alderman adopted the ordinance relying on the opinion of an Alderman that the regulation was necessary to the revitalization of city neighborhoods. The Alderman testified that he based his opinion on personal experience that "adult businesses were

not conducive to a 'stable, growing, vibrant neighborhood,'" *Thames*, 851 F.2d at 200, and that he patterned the ordinance after the Detroit ordinance upheld in *Young v. American Mini Theatres*, 427 U.S. 50 (1976). The Court of Appeals found the evidence relied on by the Board of Aldermen in adopting the ordinance sufficient to "qualify as the evidence recognized in *Renton*." *Thames*, 851 F.2d at 202.

As recently as January of this year, the Eleventh Circuit in *Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1283 (11th Cir. 2001), in remanding the case to permit further development of the record pertaining to the local government's finding that sufficient evidence of secondary effects exists to support the nude dancing regulations at issue, stated:

> While courts still have insisted on some kind of a minimal evidentiary showing, even if that showing consists of nothing more than proof that the legislature reasonably relied on findings reported elsewhere suggesting a link between the proscribed expression and negative secondary effects. *See*, e.g., *Pap's*, 120 S.Ct. at 1395 (city could and did "reasonably rely on the evidentiary foundation set forth in *Renton* and *American Mini Theatres* to the effect that secondary effects are caused by the presence of even one adult entertainment establishment in a given neighborhood"); *Sammy's*, 140 F.3d at 997 ("experiences of other cities, studies done in other cities, case law reciting findings on the issue as well as [the officials'] own wisdom and common sense" deemed sufficient).

B. A LEGISLATIVE BODY CAN USE ITS COLLECTIVE COMMON SENSE TO CONCLUDE THAT A "SEX SUPERMARKET" CAUSES DELETERIOUS EFFECTS

In *Phillips v. Borough of Keyport*, 107 F.3d 164, at 178 (3rd Cir. 1997), the Third Circuit Court of Appeals, in remanding the case to provide the Borough the opportunity to present evidence of secondary effects of adult businesses in order to show proper justification for enactment of its zoning ordinance stated:

> Whatever level of scrutiny… in a given case, we have always found it acceptable for individual legislators to base their judgments on their own study of the subject matter of the legislation, their communications with constituents, and their own life experience and common sense so long as they come forward with the required showing in the courtroom once a challenge is raised.

Again, in *801 Conklin St. Ltd. v. Town of Babylon*, 38 F. Supp. 2d 228, 239 (E.D.N.Y. 1999), a Town's zoning ordinance was found validly enacted to address adverse secondary effects of adult uses, holding "local legislative bodies can take notice of or assume matters of common knowledge or experience."

As noted above, in *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3rd Cir. 1993), the Third Circuit upheld regulations limiting the hours of operation of adult entertainment establishments. In evaluating what evidence adequately supported the Delaware legislature's conclusion that the asserted undesirable secondary effects it sought to regulate resulted from the operation of these establishments, the Court stated at 133, fn.11:

> Legislative bodies, in enacting statutes, do not receive evidence or take sworn testimony in the manner of courts. Legislative committees sometimes conduct hearings on pending bills, but the testimony they take is often unsworn and the documents they receive unauthenticated. The principles embodied in bills on the floor of a legislative body are generally debated more or less in accord with principles of logic and rhetoric, not proven through the admission of evidence... The judgment of the members of Delaware's General Assembly, like that of other legislators, is exercised on the basis of their personal experience and the experience of their constituents; their judgment is not limited by the record presented to the assembled body.

In *Thames Enterprises v. City of St. Louis*, 851 F.2d at 202, the Eighth Circuit also stated, in this regard, that "personal observations and judgments of a legislator, together with the results of research of other sources, can have substantial weight. [These observations] fall into the category of experiences that can properly be considered by a legislative body in enacting an ordinance." *See also*, *LaGrange Trading Company v. Nicolosi*, 1991 U.S. Dist. LEXIS 3551 (E.D. La. 1991), *aff'd*, 953 F.2d 642 (5th Cir. 1992), *cert. denied*, 506 U.S. 817 (1992) (quoting *Thames* for the above proposition and also upholding the City of Kenner's adult business zoning ordinance despite a challenge that the city council did not have sufficient factual support of the secondary effects).

In *State v. Russo*, 745 A.2d 540, at 545 (N.J. Super. Ct. App. Div. 2000), the State court upheld the Township's sexually oriented business buffer zone ordinance against the operator's argument that the State failed to meet its burden because no evidence was presented to the governing body or

to the municipal court bearing on the alleged negative secondary effects of nude dancing, finding:

> In short, "a national consensus emerges regarding the harmful secondary effects of sexually oriented businesses." *Hamilton Amusement Ctr.*, 156 N.J. at 270. Although the State can meet its burden "by references to studies pertaining to other jurisdictions [and] legislative history," *Hamilton Amusement Ctr.*, 156 N.J. at 271, it may also rely on "consensus, and even common sense." *Ibid.*

C. POST-ENACTMENT EVIDENCE OF NEGATIVE SECONDARY EFFECTS IS PERMISSIBLE WHEN A SEXUALLY ORIENTED BUSINESS REGULATION IS CHALLENGED

The most recent line of cases hold that a court's inquiry is not restricted to pre-enactment evidence of negative effects and that, even if not considered at the time of enactment, it is indeed proper for a municipality to defend its law with evidence gathered after the ordinance has already been challenged.

In *Phillips v. Borough of Keyport*, 107 F.3d 164, 181 (3rd Cir. 1997), the Third Circuit refused to hold unconstitutional the Borough's adult business zoning ordinance on the ground that the Borough did not make a pre-enactment record before the legislature regarding secondary effects and that it had not presented any such evidence before the district court. Instead, the Court remanded the case to the district court so that the Borough had an opportunity to develop such evidence.

Moreover, the Appeals Court rejected the challenger's argument that *Renton* and *Mitchell* endorse "a per se rule that any governmental regulation of speech is invalid if the adopting entity did not have before it, at the time of adoption, evidence supporting the constitutionality of the action taken." *Phillips*, 107 F.3d at 178. Rather, the Court of Appeals explained that "a significant difference exists between the requirement that there be a factual basis for a legislative judgment presented in court when that judgment was challenged, and a requirement that such a factual basis have been submitted to the legislative body prior to the enactment of the legislative measure." *Id.*

A few months later in *Ben Rich Trading v. City of Vineland*, *supra*, 126 F.3d 155, the Third Circuit reversed the trial court's issuance of a preliminary injunction against the enforcement of an hours of operation ordinance and reaffirmed the principle it followed in *Phillips* pertaining to a municipality's ability to provide post-enactment evidence of negative secondary effects.

Although the Third Circuit acknowledged that the City must rely on evidence of negative secondary effects, the Court found no merit in Ben Rich's argument that the City "produced no evidence that it considered secondary effects of adult establishments at the time it passed the ordinances." *Id.* at 161. Pointing to *Phillips*, 107 F.3d at 178, the Court stated, "we rejected the argument that a municipality's justification must be apparent 'at the time of adoption,' or 'before taking [legislative] action.'" *Id.*

The Eleventh Circuit in *Ranch House, Inc. v. Amerson*, 238 F.3d 1273, explained in its decision that post-enactment evidence may be properly presented when there exists a question regarding whether evidence existed as to secondary effects. Looking to other jurisdictions, the Eleventh Circuit reasoned that:

... courts have not hesitated to remand for further factfinding when dealing with these types of public decency statutes, especially when the alternative is to declare the statute invalid. See, e.g., *Pap's*, 120 S.Ct. at 1405-06 (Souter, J., concurring in part and dissenting in part) (determining that even though in his view "[t]he record before us does not now permit the conclusion that [the city's ordinance] is reasonably designed to mitigate real harms," the case should be remanded "to give it the opportunity to do so"); *J&B*, 152 F.3d at 373-75 (vacating and remanding where defendant failed to produce sufficient evidence that challenged ordinance would prevent secondary effects); *Phillips v. Borough of Keyport*, 107 F.3d 164, 173 (3d Cir.1997) (en banc) (vacating and remanding in similar circumstances).

When the Seventh Circuit in *DiMa Corp. v. Town of Hallie*, *supra*, 185 F.3d 823, affirmed the lower court's grant of summary judgment for the Town of Hallie, it concluded that the record sufficiently established that the hours of operation ordinance at issue was a reasonable attempt to control undesirable "secondary effects." In doing so, the Court referred to the Third Circuit's holding in *Phillips*, *supra*, that "a municipality may make a record for summary judgment or at trial with evidence that it may not have had when it enacted its ordinance." *Id.* at 829.

Although the Town of Hallie's ordinance did not repeat the evidence of a rational basis for belief that the hours restriction would help to ameliorate the spread of sexually transmitted diseases and the other effects it listed, the Appeals Court ultimately determined that the Town did present enough evidence by reference to judicial findings and decisions in this regard. The Court found that relying on the

experience of West Allis, Wisconsin, and citing the "same factors" used by that city in enacting its hours of operation ordinance was sufficient.

II. IT IS PROPER FOR A MUNICIPALITY TO RELY ON JUDICIALLY APPROVED STATUTORY PRECEDENT FROM OTHER JURISDICTIONS

A. THE *HART* CASE

In *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980), the Fourth Circuit Court of Appeals upheld the first "supermarket technique" zoning statute that restricted more than one sexually oriented business at a particular location. The *Hart* Court actually relied on the "1977 Los Angeles Department of City Planning, Study of the Effects of the Concentration of Adult Entertainment Establishments," to support the finding that the location restriction for adult establishments were indeed justified as a means of serving the legitimate interests in preserving residential neighborhoods and preventing urban decay. *Amicus* submits that, as it was proper for North Carolina in *Hart* to rely on the Los Angeles study to prevent sex business clustering, it was proper for the City of Los Angeles to rely on the judicially approved statutory precedent found in *Hart* when enacting the same regulation.

The Fourth Circuit in *Hart*, at 824, concluded that its decision was controlled by *Young v. American Mini-Theatres*, 427 U.S. 50 (1976), since "both the Detroit and North Carolina laws essentially regulate in similar fashion the place and manner of 'adult establishment' operations. The fundamental effect sought by both is geographic dispersal of these operations, in an obvious attempt to reduce adverse

external effects perceived to result from a concentration of 'adult' activities."[2]

In determining that the State statute was essentially a regulation of location, the Appeals Court held: "The North Carolina statute, like the Detroit Ordinance, is aimed at prohibiting a 'supermarket' marketing technique that offers for sale or exhibition at one business location a variety of sexual wares in addition to printed materials. Comparable regulation of specific techniques and methods of commerce in erotic material has not been thought violative of First Amendment values." *Id.* at 826.

The *Hart* Court concluded that the regulation furthered an important or substantial interest, since it was reasonable for the legislature to have determined that "the development of the 'total, under one roof' approach to the marketing of sexually explicit materials and devices tended to produce secondary effects destructive of the general quality of life in the neighborhood." *Id.* at 828. Furthermore, a legislative determination that the dispersal of the marketing activities could ameliorate the secondary effects to some extent, thereby furthering the state's interest, was found reasonable. *Id.* at 828-829.

Amicus submits that the City of Los Angeles's reliance on the *Hart* decision is enough to meet the *Renton* requirement that a local government may rely on evidence from other localities so long as it is "reasonably believed to

[2] If the propinquity of adult uses in the landmark *Young v. American Mini Theatres* case was believed by the Common Council to create a skid row atmosphere so much more so would two or more adult uses in the same building contribute to the creation of deleterious effects. *See American Mini Theatres*, 427 U.S. at 71, fn.34: "The Common Council's determination was that a concentration of 'adult' movie theaters causes the area to deteriorate and become a focus of crime..."

be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52.

B. *RENTON* ALLOWS FOR RELIANCE ON JUDICIALLY APPROVED FINDINGS IN OTHER COMMUNITIES OF "STUDIES" TREATING SEXUALLY ORIENTED BUSINESSES AS A "CLASS OR CATEGORY" OF USES MAY BE RELIED UPON

Amicus submits that *Renton* also supports the rule that cities may rely on judicially approved findings from other jurisdictions where the sexually oriented businesses have been treated as a "class or category" for the purpose of content-neutral regulations, so as to minimize their negative effects on surrounding communities. Furthermore, *amicus* maintains that it was proper for the City of Los Angeles to rely on its own prior study to show that adult businesses produce negative secondary effects. Courts have continuously upheld other municipalities' reliance on the body of municipal "land use" and "crime impact" studies from across the Country, including this particular 1977 study.

In the recent case of *Kismet Investors, Inc. v. County of Benton*, 617 N.W.2d 85 (Minn. App. 2000), *review denied*, Nov. 15, 2000, 2000 Minn. LEXIS 709 (Minn. 2000), the State Appeals Court affirmed a trial court's finding that the County validly denied Kismet's application for a variance. The Court found that the preamble of the zoning ordinance properly included findings that adult uses cause secondary effects and the ordinance "reasonably relies on adult-use studies from St. Paul; Indianapolis; Los Angeles; Phoenix; Rochester, Minnesota; Adams County, Colorado; and Amarillo, Texas." *Kismet*, 617 N.W.2d at 93.

Plaintiff Kismet argued that Benton County's reliance on these studies was unreasonably flawed in that they address

circumstances different from Benton County's. In rejecting their argument, the Court explained that "the county need not demonstrate which secondary effects are attributable to each of its adult uses, but may pass ordinances to address the secondary effects of adult uses as a class and to address both existing and potential adult uses in Benton County. *See Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 138 (3d Cir. 1993) (stating that state need only show that adult entertainment establishments as a class cause secondary effects)." 617 N.W.2d at 94.

Most interesting in *Kismet* is the State Court's disagreement with the Ninth Circuit's opinion in the instant case, when it rejected Kismet's argument that "a recent Ninth Circuit opinion requires a more exacting analysis to determine whether a local government reasonably relied on an adult-use study. *See Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000) (1977 study finding that concentration of adult uses causes secondary effects does not justify ordinance prohibiting multiple adult uses in one building)." Rather, the *Kismet* Court concluded that, "*Mitchell* and *ILQ* demonstrate a better application of *Renton's* holding that a local government may rely on studies from other localities if the studies are 'reasonably believed to be relevant to the problem that the [locality] addresses.' *Renton*, 475 U.S. at 51-52, 106 S. Ct. at 931." 617 N.W.2d at 94.

Similarly, in *Buzzetti v. City of New York*, 140 F.3d 134, 136 (2d Cir. 1998), *cert. denied*, 525 U.S. 816 (1998), the Second Circuit upheld New York City's sexually oriented business zoning regulations and found that:

> New York City's reliance on studies from a variety of other areas of the country was well-placed... The DCP study included both a survey of numerous studies undertaken elsewhere--

> including Islip, New York; Los Angeles, California; Indianapolis, Indiana; Whittier, California; Austin, Texas; Phoenix, Arizona; Manatee County, Florida; New Hanover County, North Carolina; and the State of Minnesota... *See also*, *Hickerson v. City of New York*, 146 F.3d 99 (2d Cir. 1998) (case involving the Zoning Resolution of the City of New York regulating the zoning of adult establishment where Court recognized the New York Court of Appeals determination that "the City Council assembled an extensive legislative record connecting adult establishments and negative secondary effects, including numerous studies on the effects of adult establishments both within and without New York City." *Stringfellow's*, 91 N.Y.2d at 397 (1998)).

In *St. Louis County v. B.A.P.*, 18 S.W.3d 397, 413 (Mo. App. 2000), the Missouri Court of Appeals upheld the County's zoning and licensing ordinances in its finding that the local government had properly relied upon studies from other jurisdictions which were reasonably believed to be relevant to its problems and that courts "do not require exact identity between the types of businesses studied by the legislative body and plaintiff's adult business."

Based on that record, the State Court determined that it was clear the Council enacted the location restrictions in the ordinances to address the anticipated impact of adult oriented or sexually oriented businesses on the surrounding areas. The Court stated, "Here, the Department and its staff, as well as the RPC, acting at the direction and on behalf of the Council, studied and considered proposed ordinance language prior to enactment, and then submitted proposed ordinances, with recommendations, for the Council's consideration. The record reveals this process included the

receipt and consideration of three studies from St. Paul, Indianapolis, and Los Angeles." 18 S.W.2d at 411.

The Court rejected B.A.P.'s argument that studies relied upon by the legislative body must address business activities that are nearly identical to those regulated by the ordinance. The Court held: "We, however, agree with other courts, including the Eighth Circuit, that do not require exact identity between the types of businesses studied by the legislative body and plaintiff's adult business or all the adult businesses regulated by the challenged ordinance." *Id.* at 413.

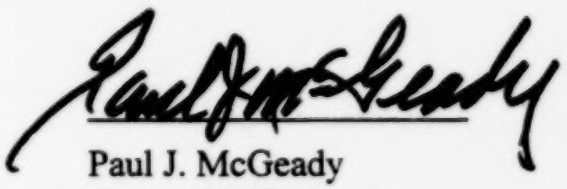
The State Court was also referring to *ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994), *cert. denied*, 513 U.S. 1017 (1994), where the Eighth Circuit reversed the district court's conclusion that the city unreasonably relied on studies focusing on businesses that were not identical to plaintiff's business. *ILQ Invs., Inc.*, 25 F.3d at 1417. The Eighth Circuit held that the studies "identified and measured adverse secondary effects linked to adult businesses generally... Even if [plaintiff's business] is a new type of adult business, it may not avoid time, place, and manner regulation that has been justified by studies of the secondary effects of reasonably similar businesses. *Id.* at 1417.

Also in *Z.J. Gifts D-2, L.L.C. v. City of Aurora*, 136 F.3d 683, 687 (10th cir. 1998), *cert. denied*, 525 U.S. 868 (1998), the Tenth Circuit held "differences in the mode of delivery of sexually oriented materials are constitutionally insignificant for purposes of determining an ordinance's content-neutrality." *See also, Ben Rich Trading v. City of Vineland*, 126 F.3d 155, 162 (3rd Cir. 1997) (concluding that a city is not required to "lay out in specific detail how its situation is sufficiently similar to [those jurisdictions conducting studies on which the city relied] in order to make their studies relevant").

CONCLUSION

For all of the above reasons, your *amicus* prays that this Honorable Court reverse the judgment of the court below or in the alternative remand for additional consideration and study.

Respectfully submitted,



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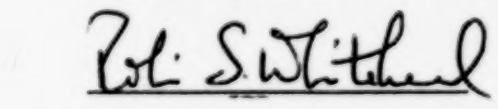

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